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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 WTI, Inc., a Washington Corporation,

9 Plaintiff,

10 v.

11 AFFINITY NETWORK, INC., a
12 California Corporation, and NOSVA
13 LIMITED PARTNERSHIP, a Maryland
14 Limited Partnership,

Defendants.

Case No. C09-0497MJP

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS THE
COMPLAINT

15 This matter comes before the Court on Defendants' motion to dismiss the
16 complaint. (Dkt. No. 8.) The Court has not received any response memorandum from
17 Plaintiff or any reply brief. For the reasons set forth below, the Court GRANTS
18 Defendants' motion and dismisses this matter.

19 **Background**

20 Plaintiff WTI, a Washington corporation, sued Defendants Affinity Network
21 ("ANI"), a California corporation, and NOSVA Limited Partnership ("NOSVA"), a
22 Maryland Limited Partnership, asserting jurisdiction based on diversity of citizenship.
23 (Compl. ¶¶ 1.1-1.4, 2.1.) The complaint seeks relief for injuries arising out of two
24 contracts: (1) WTI's "Wholesale Carrier Service Agreement" with ANI (hereinafter
25 "Wholesale Agreement") and (2) WTI's "Sales Agency Agreement" with NOSVA
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1 (hereinafter “Agency Agreement”). (Id. ¶¶ 3.1, 3.8.) Neither Defendant is a party to both
2 contracts. Based on the Agency Agreement, WTI asserts it is entitled to \$311,109.14 in
3 accounting from NOSVA. (Id. ¶ 4.2; see also ¶ 3.10 (seeking an additional \$60,000.00
4 from NOSVA).) The Complaint also seeks \$42,677.43 from ANI under the Wholesale
5 Agreement. (Id. ¶ 3.7.)

6 The Agency Agreement contains a forum selection clause that provides:

7 “This agreement shall be governed and construed in accordance with the
8 laws of the State of Nevada, without regard to its conflict of laws
9 principles. For the adjudication of any disputes arising under this
10 Agreement, the parties hereby consent to the exclusive jurisdiction and
11 venue in the state and federal courts located in Las Vegas, Nevada.”

12 (Benedict Decl., Ex. A at ¶ 21.)

13 Discussion

14 Defendants move to dismiss the complaint because (1) claims against NOSVA
15 must be dismissed pursuant to Fed. R. Civ. P. 12(b)(3) and (2) any remaining claims
16 against ANI must be dismissed for failure to satisfy the amount in controversy
17 requirement of 28 U.S.C. § 1332. (See Dkt. No. 8.) Plaintiff has failed to provide any
18 response. Under Local Rule 7(b)(2), when a party fails to oppose an adverse motion,
19 “such failure may be considered by the court as an admission that the motion has merit.”
20 Defendants’ motion must be granted on both issues.

21 First, a motion to dismiss based on the enforcement of a forum selection clause is
22 treated as a motion for dismissal based on improper venue under Fed. R. Civ. P. 12(b)(3).
23 Arguenta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (further noting
24 12(b)(3) analysis allows the court to consider facts outside the pleadings). When
25 deciding a motion to dismiss based on a forum selection clause, the Court must assess
26 whether the contract’s language is mandatory or permissive. Docksider, Ltd. v. Sea
Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989). The language of the forum

1 selection clause in the Agency Agreement in unequivocal: “For the adjudication of any
2 disputes arising under this Agreement, the parties hereby consent to the exclusive
3 jurisdiction and venue in the state and federal courts located in Las Vegas, Nevada.”
4 (Benedict Decl., Ex. A at ¶ 21.) Defendants are therefore entitled to dismissal of all
5 claims arising out of the Agency Agreement. (See Dkt. No. 8 at 6.)

6 Second, under 28 U.S.C. § 1332(a), district courts have original jurisdiction over
7 civil actions between diverse litigants where “the matter in controversy exceeds the sum
8 or value of \$75,000, exclusive of interests and costs....” To be entitled to dismissal, a
9 defendant must demonstrate with “legal certainty” that the claim is less than \$75,000.
10 Crum v. Circus Circus Enterprises, 231 F.3d 1129, 1131 (9th Cir. 2000). Plaintiff’s
11 complaint seeks only \$42,677.43 from ANI based on the Wholesale Agreement. (Compl.
12 ¶ 3.7.) In the absence of the NOSVA contract to buttress its aggregate damages total,
13 Plaintiff’s claims against ANI plainly fall below the jurisdictional minimum.

14 Defendants are entitled to dismissal of all claims.

15 Conclusion

16 The Court GRANTS Defendants’ motion (Dkt. No. 8) and finds and orders as
17 follows: (1) Plaintiff’s claims against NOSVA are DISMISSED under Rule 12(b)(3) for
18 failure to comply with a mandatory forum selection clause and (2) Plaintiff’s claims
19 against ANI are DISMISSED for failure to satisfy the amount in controversy requirement
20 of 28 U.S.C. § 1332. This matter hereby is dismissed.

21 Dated this 27th day of October, 2009.

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24 Marsha J. Pechman
25 United States District Judge
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